



June 15, 2001

Ms. Tracy Segrato  
Staff Attorney  
Texas Municipal League Intergovernmental Risk Pool  
P.O. Box 149194  
Austin, Texas 78714-9194

OR2001-2288A

Dear Ms. Segrato:

This office issued Open Records Letter No. 2001-2288 (2001). In that ruling, we concluded that you had not complied with section 552.301 of the Government Code in requesting the decision. We therefore directed you to release the requested information under section 552.302. However, you have subsequently provided evidence sufficient to show that this office erred in finding that you had not submitted the requested information or representative samples of the information under section 552.301. Where this office determines that an error was made in the decisional process under sections 552.301 and 552.306, and that the error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2001-2288 (2001).

The Texas Municipal League Intergovernmental Risk Pool (the "risk pool") received a request for four categories of information, including "all information, documentation, or any other material in the . . . personnel/permanent files" of forty-eight (48) current or former employees. You claim that the personnel file information is excepted from public disclosure under section 552.103 of the Government Code. We have considered the exception you raise and have reviewed the submitted representative samples of responsive information.<sup>1</sup>

We first address your statement that the other information to which the requestor seeks access "has either been given to her already or simply does not exist." We take this statement to mean that the risk pool is not in possession or control of any information that is responsive to paragraph nos. 2, 3, or 4 of the request for information. A governmental

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<sup>1</sup>This letter ruling assumes that the submitted information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the risk pool to withhold any responsive information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D): Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

body is not required to disclose information that did not exist when the request for the information was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

You claim that the rest of the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documentation sufficient to establish the applicability of section 552.103 to the information for which it claims this exception. To sustain its burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1<sup>st</sup> Dist.] 1984, writ refused n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You assert that the submitted information relates to a pending lawsuit to which the risk pool is a party. Based on your representations and the background materials that you submitted, we find that the requested information relates to pending litigation to which the risk pool was a party on the date of its receipt of the request for information.

Section 552.103 does not permit the risk pool to withhold information that the opposing party to the pending litigation already has seen or to which she previously has had access. The purpose of section 552.103 is to enable a governmental body to protect its position in anticipated or pending litigation by forcing a party seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551

at 4-5 (1990). Thus, if the opposing party to the litigation already has seen or had access to information relating to the litigation, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982).

In this instance, the background materials that you submitted reflect that the federal court ordered the risk pool to release the two submitted personnel files to the requestor as the plaintiff in the pending litigation. Therefore, the submitted personnel file information is not protected from disclosure under section 552.103. We conclude, however, that the risk pool may withhold the rest of the requested personnel file information at this time under section 552.103.<sup>2</sup>

Although the submitted personnel files are not excepted from disclosure under section 552.103 because the requestor already has had access to them, these documents include information that the risk pool must withhold under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that is made confidential by other statutes. Section 6103 of title 26 of the United States Code makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4<sup>th</sup> Cir. 1993). We have marked W-4 forms that the risk pool must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of the Internal Revenue Code.

Section 552.101 also encompasses the common law right to privacy. Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The matters deemed to be intimate and embarrassing in *Industrial Foundation* include sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *See* 540 S.W.2d at 683; *see also* Open Records Decision No. 659 at 5 (1999) (listing other types of information that attorney general has held to be protected by a right to privacy). We have marked information that the risk pool must withhold under section 552.101 in conjunction with common law privacy.

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<sup>2</sup>We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The risk pool must not release confidential information, however, even at the conclusion of the litigation. *See* Gov't Code §§ 552.007, .101, .352.

Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992), 545 at 3-5 (1990), 523 at 3-4 (1989), 373 at 3-4 (1983). Thus, a public employee's allocation of part of his or her salary to a voluntary investment program offered by the employer is a personal investment decision, and information about the allocation is protected from public disclosure by the common law right to privacy. *See* Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan), 523 (1989) (contents of loan files of veterans participating in Veterans Land Board programs), 373 (1983) (contents of housing rehabilitation grant application files). On the other hand, common law privacy does not except from disclosure information about a transaction that is funded in part by the state or another governmental entity. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990), 523 at 4 (1989). We have marked personal financial information that the risk pool must withhold under section 552.101 in conjunction with common law privacy.

Section 552.117(1) excepts from disclosure the home address, home telephone number, and social security number of a current or former government employee, as well as information revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024*. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We have marked home address and telephone number, social security number, and other personal information that may be excepted from disclosure under section 552.117.

A social security number also may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* ORD 622 at 2-4. It is not apparent to this office that any social security number in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes the risk pool to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number in the submitted records was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, prior to releasing a social security number, the risk pool should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, section 552.130 of the Government Code provides that “[i]nformation is excepted from [required public disclosure] if the information relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1). We have marked Texas driver’s license information that the risk pool must withhold under section 552.130.

In summary, the requested personnel files to which the requestor has not already had access may be withheld under section 552.103. Although the two submitted personnel files are not excepted under section 552.103, they contain confidential information that the risk pool must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of the Internal Revenue Code. The risk pool also must withhold the submitted information that is protected by common law privacy. A current or former employee’s home address, home telephone number, social security number, and other personal information may be excepted from disclosure under section 552.117. A social security number also may be confidential under section 552.101 in conjunction with federal law. The risk pool must withhold Texas driver’s license information under section 552.130. Except for information that is protected under sections 552.101, 552.117, or 552.130, the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

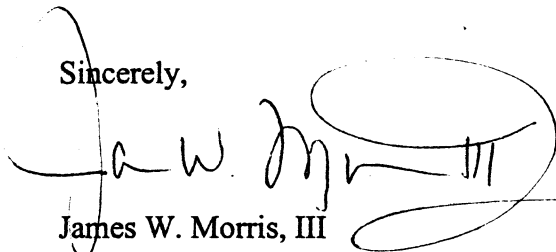
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a large, loopy flourish extending from the end of the signature.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 147943A

Encl. Marked documents

cc: Ms. Marianne C. Geraci  
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(w/o enclosures)